Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Free Press et al. Petition for Declaratory Ruling	)	WC Docket No. 07-52
	)	
	)	
Broadband Industry Practices	)	
	)	

Ex Parte Letter of John Blevins[1]
Regarding the Commission's Ancillary Jurisdiction

INTRODUCTION AND SUMMARY

This letter responds to arguments raised in Comcast's July 10, 2008 legal memorandum[2] regarding the scope of the Commission's ancillary jurisdiction under Title I of the Communications Act.[3] Given the importance of this proceeding,[4] the Commission should have a complete view of its jurisdictional authority under the relevant case law. I respectfully submit that Comcast's description of this case law was incomplete on at least three key issues.[5]

First, Comcast argues that Title I is not an independent source of regulatory authority. Numerous cases, however, expressly contradict this argument. This long line of cases – which includes controlling Supreme Court precedent – establishes that Title I's

[1] I am currently an Assistant Professor of Law at South Texas College of Law in Houston, Texas. I do not represent any parties in this proceeding and I speak only for myself.
[2] Ex Parte Communication of Kathryn A. Zachem, *Broadband Industry Practices*, WC Docket No. 07-52 (July 10, 2008) (attaching Comcast legal memorandum) (*Comcast Memorandum*).
[3] Title I encompasses §§ 1-11 of the Communications Act, 47 U.S.C. §§ 151-161.
[4] *Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement*, WC Docket No. 07-52 (Nov. 1, 2007).
[5] My letter responds only to these three specific arguments that Comcast made regarding ancillary jurisdiction (*see Comcast Memorandum* at 26-45). I express no opinions on any other legal or policy argument made in the Comcast memorandum.

provisions, standing alone, can provide the Commission with the necessary regulatory authority to exercise ancillary jurisdiction.

Second, Comcast argues that the Commission's ancillary jurisdiction is limited to enforcing its "statutorily mandated responsibilities," and does not extend to enforcing mere statutory "goals." This alleged limitation on the Commission's authority, however, finds little support in the case law, and appears to be based on a misreading of certain language in a recent D.C. Circuit opinion.[6] In reality, several courts have recognized that the Commission can enforce under its ancillary jurisdiction the broad policy goals specifically expressed within Title I (including § 1).[7]

Third, I briefly address – and critique – Comcast's account of the Commission's *Computer II* decisions and the role that Title I ancillary jurisdiction played within those proceedings.[8]

I. TITLE I PROVIDES AN INDEPENDENT SOURCE OF REGULATORY AUTHORITY.

A. Courts Have Consistently Held That Title I Provides Independent Regulatory Authority to Exercise Ancillary Jurisdiction.

Comcast argues that Title I "is not a self-contained source of both jurisdiction and substantive regulatory power."[9] This argument is inconsistent with the weight of relevant authority. Before listing those cases though, it is important to understand the doctrinal implications of Comcast's argument.

[6] *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).
[7] 47 U.S.C. § 151 (stating that one purpose of Commission is to "make available . . . a rapid, efficient, Nation-wide . . . wire and radio communication service with adequate facilities at reasonable charges").
[8] *See generally Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) ("Computer II").*
[9] *Comcast Memorandum* at 28.

As Comcast correctly notes, courts have adopted a two-pronged test to analyze whether the Commission has the authority to exercise its ancillary jurisdiction.[10] Under this test, authority exists when (1) "the subject of the regulation [is] covered by the Commission's general grant of jurisdiction under Title I," and (2) "the subject of the regulation [is] 'reasonably ancillary to the effective performance of the Commission's various responsibilities.'" *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005) (quoting *United States v. Sw. Cable,* 392 U.S. 157, 178 (1968)).[11] Comcast concedes that the first prong is met here because broadband access is a "communication by wire and radio."[12]

Comcast argues, however, that Free Press has not established that the second prong ("reasonably ancillary") can be met. While Comcast offers numerous arguments to support this claim, I address only one in this section – namely, that Title I does not independently provide authority to exercise ancillary jurisdiction. Essentially, Comcast is arguing that no regulation can be "reasonably ancillary" to Title I alone. Instead, Comcast argues, the Commission must anchor its regulations to a statutory responsibility that exists *outside* of Title I.[13]

Numerous cases, however, expressly contradict Comcast's argument. Collectively, these cases establish that Title I *alone* can provide the Commission with the necessary regulatory authority (and not merely with subject matter jurisdiction):

- *United States v. Sw. Cable Co*., 392 U.S. 157, 172 (1968) ("Nothing in the language of [§] 152(a), in the surrounding language, or in the Act's history or

[10] *Id*. at 26-27.
[11] The D.C. Circuit alternates between using the language "various responsibilities" and "statutorily mandated responsibilities." *Am. Library Ass'n*, 406 F.3d at 693, 700. As I explain in Part II, it is unlikely that the court's use of the latter phrase was intended to limit the Commission's authority in the manner Comcast suggests.
[12] *Comcast Memorandum* at 28.
[13] *Id*. at 28-30.

purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions.") (upholding cable regulation).

- *Gen. Tel. Co. of Sw. v. United States*, 449 F.2d 846, 853 (5th Cir. 1971) ("The Supreme Court . . . has concluded that Section 2(a) [47 U.S.C. §152(a)] of the Communications Act alone is sufficient to support the Commission's assertion of jurisdiction over CATV systems.") (upholding regulations on phone companies providing cable).

- *United States v. Midwest Video Corp*., 406 U.S. 649, 660 (1972) ("We also held that [§] 2(a) [47 U.S.C. § 152(a)] is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply[.]") (upholding cable regulation).

- *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730 (2d Cir. 1973) ("The rules we are now considering are generically based upon the primary charge of the Commission that its carriers provide *efficient* and economic service to the public. The burgeoning data processing activities of the common carriers pose . . . a threat to efficient public communications services at *reasonable prices* and hence regulation is justified under its broad rule-making authority.") (citing 47 U.S.C. §§ 151, 154(i)) (upholding structural separation requirement for carriers providing data services) (emphases added).[14]

- *CCIA v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) ("[I]t [i]s settled beyond peradventure that the Commission may assert jurisdiction under section 152(a) of the Act over activities that are not within the reach of Title II. . . . [T]he exercise of ancillary jurisdiction over both enhanced services and CPE [i]s necessary to assure wire communications services at *reasonable rates*.") (upholding *Computer II*) (emphasis added).

- *Rural Tel. Co. v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) ("As the Universal Service Fund was proposed in order to further the objective of making communication service available to all Americans at *reasonable charges*, the proposal was within the Commission's statutory authority.") (citing §§ 151 and 154(i) to uphold creation of Fund) (emphasis added).

- *NARUC v. FCC,* 880 F.2d 422, 429-30 (D.C. Cir. 1989) ("We agree with the FCC that this policy is consistent with *the goals* of the Act, *see* 47 U.S.C. § 151, and that it has the authority to implement this policy with respect to interstate

[14] As explained in more detail below, the court found that the regulation at issue here furthered the Commission's responsibility to assure "efficient" "reasonable prices." These responsibilities – indeed, these very words – come directly from § 151 (stating that purpose of Commission is to "make available . . . *efficient* . . . communication service with adequate facilities *at reasonable charges*") (emphases added).

communication.") (acknowledging preemption authority under Title I) (emphasis added).

- *NCTA v. Brand X Internet Servs.,* 545 U.S. 967, 976 (2005) ("[T]he Commission has jurisdiction to impose additional regulatory obligations [on "information service providers"] under its Title I ancillary jurisdiction to regulate interstate and foreign communications, see §§ 151-161.").[15]

Critically, the regulations upheld in these cases were "reasonably ancillary" to policies that come *directly* from the language of Title I. For instance, § 1 [47 U.S.C. § 151] provides that one "purpose" of the Commission is to establish a "rapid, *efficient*, Nation-wide . . . wire and communication service with adequate facilities *at reasonable charges*."[16] Section 4(i) [47 U.S.C. § 154(i)], in turn, provides the regulatory authority to enforce these policies. Specifically, it states that the Commission can "perform any and all acts . . . as may be necessary in the execution of its functions."[17]

Courts have cited these specific provisions from Title I in upholding exercises of the Commission's ancillary jurisdiction. Indeed, in several of these cases, the courts have explicitly found that the regulations are "reasonably ancillary" to Title I policies such as ensuring "efficient" service and "reasonable charges."[18] Further, in these same cases, the courts did not cite any other source of authority outside of Title I to justify the Commission's exercise of its ancillary jurisdiction.[19] It is difficult to reconcile Comcast's claims that Title I is not an independent source of authority with this line of cases.

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[15] *Brand X* is different from the other cases in that the Court did not rule on an exercise of ancillary jurisdiction. It did, however, strongly suggest that Title I provides authority to regulate information service providers. It also cited the statutory provisions of Title I to justify this statement.
[16] 47 U.S.C. § 151 (emphasis added).
[17] 47 U.S.C. § 154(i). Section 4's authority is not limited to Title I policies, but also extends to the Act more generally. My letter, however, is limited to analyzing the Title I context.
[18] *NARUC*, 880 F.2d at 429-30 (citing § 1 as "goal" of Act that can be implemented); *Rural Tel. Co*., 838 F.2d at 1315 (citing need to promote "reasonable charges"); *CCIA*, 693 F.2d at 213 (citing need to promote "reasonable rates").
[19] *Id*. The courts in the three cases cited above (*supra* note 18) justify the Commission's ancillary jurisdiction by Title I provisions alone. While it is possible to speculate about what hypothetical links to

Admittedly, in some of the cases listed above, the courts also had an alternative jurisdictional anchor in a statutory provision outside of Title I.[20] Even in these cases, however, the courts nonetheless confirmed that Title I provides independent regulatory authority. *Southwestern Cable* – the seminal ancillary jurisdiction case – illustrates this point well.

One reading of *Southwestern Cable* is that the Court upheld the Commission's regulation of cable because it was "reasonably ancillary" to broadcasting provisions under Title III.[21] That reading is not so much incorrect as it is incomplete. The Court also specifically held that Title I could provide regulatory authority (again, not merely subject matter jurisdiction) independently of other provisions.

> Second, respondents urge that [§] 152(a) does not independently confer regulatory authority upon the Commission . . . We cannot construe the Act so restrictively. Nothing in the language of [§] 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions.[22]

Indeed, this conclusion is consistent with the underlying report and order, which had concluded that the Commission had independent authority under *both* the Title I provisions *and* the Title III provisions to regulate cable systems.[23]

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other non-Title I provisions might apply, it would nonetheless be an exercise in conjecture that requires going beyond the specific language of the opinions.

[20] For instance, the regulations upheld in *Southwestern Cable* and *Midwest Video Corp. I* were linked to the Commission's Title III authority to regulate broadcasting. *See Sw. Cable*, 392 U.S. at 178.

[21] *Comcast Memorandum* at 30.

[22] *Sw. Cable*, 392 U.S. at 171-72.

[23] *See* Notice of Inquiry and Notice of Proposed Rulemaking, *Amendment of Parts 21, 74 (Proposed Subpart J), and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters*, 1 F.C.C.R.2d 453, 464-65, 478-81 (1965) (attaching "Commission Memorandum on Its Jurisdiction and Authority" as Appendix B). The "tentative" conclusion that the Commission had authority to regulate cable was affirmed in a later report and order (*see* 2 F.C.C.R.2d 725, 733-34 (1966)).

B. The Cases Comcast Cites Fail to Establish that the Commission Lacks Independent Regulatory Authority Under Title I.

Admittedly, and as Comcast correctly notes, courts have not uniformly upheld the Commission's exercises of ancillary jurisdiction. These cases, however, do not establish that Title I lacks independent regulatory force. Indeed, upon close review, these cases are either inapplicable to the specific issue addressed in this letter, or are outliers that are inconsistent with the overwhelming weight of authority.

The D.C. Circuit has recently vacated two orders that were based on the Commission's ancillary jurisdiction.[24] These two cases, however, are easily distinguishable. In the more recent one, *American Library Association*, the D.C. Circuit rejected the Commission's broadcast flag rules.[25] It held, however, that the broadcast flag regulations failed to meet the *first* prong of the ancillary jurisdiction analysis – that is, the regulation did not cover a "communication by wire or radio" under Title I.[26] The opinion thus provides little guidance on the specific question of whether Title I provides an independent source of regulatory authority on subjects *within* the Commission's subject matter jurisdiction.

Similarly, the D.C. Circuit's opinion in *Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) ("*MPAA*"), is largely irrelevant. There, the court invalidated the Commission's video description rules, holding that "program content" falls outside of Title I altogether.[27] While the court's doctrinal analysis is less clear in

[24] *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[25] 406 F.3d at 691-92.
[26] *Id*. at 700 ("]T]he regulations adopted in the *Flag Order* do not fall within the scope of the Commission's general jurisdictional grant. Therefore, the Commission cannot satisfy the first precondition to its assertion of ancillary jurisdiction.").
[27] 309 F.3d at 806-07.

this case, it appears that *program content* regulation (which the court emphasized was the determinative fact) also falls outside the first prong of the ancillary jurisdiction analysis.[28]

In any event, neither case contradicts the long line of cases establishing independent regulatory authority for Title I. Indeed, if anything, these cases suggest that recognizing the independent regulatory authority of Title I does not imply that the Commission's ancillary jurisdiction is unlimited or unconstrained.

One case that does, however, contradict this line of cases is *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).[29] Admittedly, the court there stated that § 151 (and presumably § 154(i) as well) "has not heretofore been read as a general grant of power."[30] This case, however, should not be given significant weight. For one, it is an outlier that contradicts the more extensive list of authority above that holds just the opposite. Indeed, cases before and after the *NARUC* decision (including D.C. Circuit cases) affirmed that Title I provides a self-contained source of authority to exercise ancillary jurisdiction. In addition, the *NARUC* court arguably misread the immediately preceding case law, which had in fact found that Title I confers independent regulatory authority. Finally, the case is also inconsistent with the controlling Supreme Court decisions listed above.

[28] Interestingly, the court suggested that the Commission's ancillary jurisdiction expands when applied to ensuring "accessibility" of "transmissions." *Id*. at 804. ("Both the terms of § 1 and the case law amplifying it focus on the FCC's power to promote the accessibility and universality of transmission, not to regulate program content.").

[29] Another case cited by Comcast – *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) – did not rule directly on the issues raised in this letter. Instead, it overturned some of the FCC's *Computer III* rules on two grounds: (1) they were arbitrary and capricious; and (2) they intruded on intrastate jurisdiction, which is forbidden under § 152(b)(1). *Id*. at 1238-39.

[30] *Id.* at 614 n.77.

II. THE COMMISSION CAN EXERCISE ANCILLARY JURISDICTION TO ENFORCE TITLE I POLICY "GOALS."

Comcast argues that the Commission cannot use its ancillary jurisdiction to enforce the "goals" of Title I.[31] Instead, it contends that the Commission can only enforce "statutorily mandated responsibilities" through its ancillary jurisdiction. Thus, because Title I lacks any "statutorily mandated responsibilities" to be enforced, it cannot – Comcast contends – provide independent regulatory authority.

While this point is not entirely clear, Comcast seems to suggest that there is a meaningful doctrinal distinction between "statutorily mandated responsibilities" and statutory "goals," and further suggests that the Commission can act only on the former. This distinction, however, simply does not exist in the case law reviewing Title I authority.

Most importantly, courts have routinely upheld exercises of ancillary jurisdiction that enforce *Title I's* policy goals alone. The specific language the courts have used confirms that it is indeed the broad policy goals expressly included in Title I that are being enforced (e.g., "efficient" service at "reasonable charges").[32] For instance, in *Rural Telephone Company*, the D.C. Circuit upheld the creation of the Universal Service Fund by citing the policies and provisions of Title I *alone*:

> The Commission was established "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, ... wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S.C. § 151 (1982). Moreover, the Commission is authorized to "make such rules and regulations ... as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1982). As the Universal Service Fund was proposed in order *to further the objective of making communication*

[31] *Comcast Memorandum* at 29.
[32] 47 U.S.C. § 151.

> *service available to all Americans at reasonable charges*, the proposal was within the Commission's statutory authority. We have recognized previously that universal service is an important FCC objective. *See NARUC,* 737 F.2d at 1108. *Cf. GTE Service Corp. v. FCC,* 474 F.2d 724, 730-31 (2d Cir.1973) (Commission has authority under 47 U.S.C. §§ 151 & 154(i) to regulate data processing activities of common carriers, which pose a "threat to efficient public communications services at reasonable prices").[33]

Other cases cite similar language – again, lifted directly from Title I – in upholding the Commission's exercises of ancillary jurisdiction to enforce Title I's goals and purposes.[34]

These cases thus contradict Comcast's argument that Title I's provisions cannot independently support exercises of ancillary jurisdiction because those provisions do not impose "statutorily mandated responsibilities." Regardless of whether the policies listed in Title I are linguistically labeled as "mandated responsibilities" or "goals," the cases make clear that they can provide a sufficient jurisdictional foundation.

Comcast's overly-narrow interpretation of the case law arguably stems from a misreading of the D.C. Circuit's 2005 opinion in *American Library Association*, which used the phrase "statutorily mandated responsibilities."[35] According to my research, this opinion was the first to ever use this precise phrase in the Title I context.[36] There is no indication, however, that the D.C. Circuit's use of the phrase was intended to narrow the Commission's authority by precluding it from enforcing policy "goals." In fact, in establishing the doctrinal framework, the D.C. Circuit alternated between the phrases

[33] *Rural Tel. Co*., 838 F.2d at 1315 (emphasis added).
[34] *NARUC*, 880 F.2d at 429-30 (citing § 1 as "goal" of Act that can be implemented); *CCIA*, 693 F.2d at 213 (citing authority to promote "reasonable rates").
[35] 406 F.3d at 700.
[36] Other cases have used the term "mandate," but generally to emphasize that the Commission had broad authority under subjects within its jurisdiction. *See, e.g., Sw. Cable*, 392 U.S. at 172-73 ("Congress in 1934 acted in a field that was demonstrably 'both new and dynamic,' and it therefore gave the Commission 'a comprehensive mandate[.]'") (quoting *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943)).

"statutorily mandated responsibilities" and "various responsibilities," the latter arguably being broader.[37] In any event, without more specific language, *American Library Association* should not be read as repudiating the long line of cases establishing that Title I's policy goals can provide an independent basis for the Commission's ancillary jurisdiction.

III. THE *COMPUTER II* PROCEEDINGS PROVIDE A USEFUL ANALOGY FOR THE JURISDICTIONAL ISSUES IN THIS PROCEEDING.

Comcast misconstrues the *Computer II* proceedings by arguing that the Commission's assertion of ancillary jurisdiction there provides "no analogy" to the current proceeding.[38] In reality, *Computer II* provides a quite useful analogy. Specifically, it illustrates that the courts have given the Commission wide latitude to exercise its Title I ancillary jurisdiction to prevent anti-competitive conduct by facilities providers with respect to underlying transmissions.

Generally speaking, courts have been deferential to exercises of ancillary jurisdiction when the Commission is addressing potential anti-competitive conduct of facilities providers.[39] This deference applies even when courts find that ancillary jurisdiction stems entirely from Title I. For instance, in affirming the Commission's

[37] *Am. Library Ass'n*, 406 F.3d at 693, 700.
[38] *Comcast Memorandum* at 42.
[39] *See, e.g., NARUC*, 880 F.2d at 429-30 (acknowledging Commission's authority to promote competition for telephone communications wiring); *CCIA*, 693 F.2d at 208 (outlining anti-competitive concerns that led Commission to adopt *Computer II* rules); *Lincoln Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) (upholding Commission's authority to establish interim interconnection agreement between MCI and an ILEC); *GTE v. FCC*, 474 F.2d at 729 ("Having found the close and mutual relationship between common carriers and data processing, the Commission's basic concern has been that the statutory obligation of the communication common carrier to provide adequate and reasonable services could be adversely affected by their also providing data processing services."); *Gen. Tel. Co*., 449 F.2d at 850-51 ("The Commission was of the opinion that by reason of their control over utility poles or conduits, the telephone companies were in a position to preclude or substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition.").

jurisdiction to enact the *Computer II* rules, the D.C. Circuit in *CCIA* relied entirely on Title I provisions.[40]

By contrast, courts have been less deferential when the Commission attempts to exercise Title I ancillary jurisdiction to address other concerns unrelated to potential anticompetitive conduct by facilities providers. For instance, in both *MPAA* and *American Library Association*, the D.C. Circuit rejected the Commission's efforts to address goals largely unrelated to potential market abuses relating to control of underlying facilities (video programming descriptions and broadcast flags, respectively).[41]

Accordingly, the Free Press petition raises jurisdictional issues far more analogous to the *Computer II* proceedings than to the more recent D.C. Circuit cases.

[40] *CCIA*, 693 F.2d at 208, 212-14.
[41] *See supra* notes 24-28 and accompanying text.

CONCLUSION

The Free Press petition raises important questions regarding the future of our country's advanced telecommunications services, and I applaud the Commission for the steps it has taken to study these important issues closely. My letter is intended to assist the Commission on three specific legal issues that were not adequately described in the case law that Comcast provided. First, the case law establishes that Title I alone provides independent and self-contained regulatory authority. Second, the cases do not support an arbitrary distinction between policy "goals" and "statutorily mandated responsibilities" in the Title I context. Finally, Comcast misconstrues the extent to which the *Computer II* proceedings provide a useful analogy to the jurisdictional questions in this proceeding.

Respectfully submitted,

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